SEC Publishes Interpretive Release Regarding Disclosures Related To Climate Change

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Jeffrey A. Ott, *Steven C. Kohl*

The Securities and Exchange Commission (SEC) recently issued an interpretive release that provides guidance concerning the application of existing SEC disclosure requirements to climate change matters. This guidance had been sought by a number of investors, state officials and environmental groups for years. The release does not create new disclosure requirements. For example, the release does not require companies to disclose their carbon footprints or their internal efforts and policies for reducing carbon emissions.

In the release, the SEC highlights existing provisions of Regulation S-K that require non-financial statement disclosure of climate change issues:

- Item 101 requires a description of the business of the company and its subsidiaries, including a description of the material effects upon earnings, capital expenditures or competitive position of compliance with environmental laws.

- Item 103 requires a description of any material pending legal proceedings to which the company or any subsidiary is a party or their properties are subject, including certain administrative or judicial proceedings arising under environmental laws.

- Item 303 requires MD&A, including disclosure of known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on financial condition or operating performance.

- Item 503 requires disclosure of significant risk factors that make an investment in the company speculative or risky.

Foreign private issuers are generally subject to comparable disclosure requirements under Form 20-F.

In addition, the SEC notes that disclosure of climate change matters could be required if they are material under more general standards. According to these standards, information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or if the information would alter the total mix of available information.

The release then outlines four major climate change topics that companies should think about when preparing SEC disclosures:

- **Impact of Legislation and Regulation.** Companies must disclose the material effects of compliance with enacted environmental laws and regulations, and the SEC suggests that companies should consider specific risks they face as a result of climate change legislation or regulation and avoid generic risk factor disclosure that could apply to any company. With respect to proposed legislation and regulations, a company must consider disclosures assuming that the pending legislation or regulation will be enacted, unless management determines that such a result is not reasonably likely. Companies should also consider and disclose, if material, the difficulties involved in assessing the timing and effect of the pending legislation or regulation. Disclosure should include both material adverse and material favorable effects on the company. Examples of consequences noted by the SEC include: costs to purchase or profits from sales of allowances or credits under a cap and trade system; costs required to improve facilities and equipment to reduce emissions; changes to profit or loss arising from increased or decreased demand for goods and services, or costs of producing such goods and services, arising directly from legislation or regulation.

- **Impact of Treaties and International Accords.** Companies should also consider and disclose, if material, the effects of enacted and proposed treaties and international accords. The release cites the Kyoto Protocol and the European Union Greenhouse Gas Emission Trading System as examples.

- **Indirect Consequences of Regulation or Business Trends.** The direct and indirect effects of legal, technological, political and scientific developments regarding climate change may have an effect on a company's business and should be considered and disclosed, if material. Such factors may create or decrease demand for new or existing goods and services. Changes in business direction or facilities that take advantage of opportunities or reposition away from certain operations could trigger disclosure. Reputational damage resulting from public opinion may also trigger disclosure for some companies if they are sensitive to public opinion.

- **Physical Impacts of Climate Change.** Actual physical effects of climate change may also have a material effect on a company such that disclosure may be required. Companies should consider the effects of severity of weather (for example, floods and hurricanes) and changes in weather, sea levels, the arability of farmland, and water availability and quality. Companies with coastal facilities (production or transport), insurance companies and financial institutions, and agricultural businesses are cited as examples of companies that should consider the physical impacts of climate change.

The attorneys in Warner Norcross & Judd LLP's Corporate Sustainability and Climate Group are prepared to assist clients affected by the SEC's interpretive release and any other securities or greenhouse gas/carbon regulation issues. If you have any questions concerning corporate disclosure of greenhouse gas, carbon or climate change issues, please contact Jeff Ott, a partner in our Securities Law practice, at

616.752.2170 or jott@wnj.com, or Steve Kohl, the chair of our Greenhouse Gas/Carbon Regulation practice, at 248.784.5141 or skohl@wnj.com.